

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

STATE OF DELAWARE

V.

KATHLEEN MCGUINESS

Defendants.

ID No. 2110001942

Submitted: April 7, 2022

Decided: April 13, 2022

**Defendants' Motion to Compel – GRANTED in Part and DENIED in Part**

# MEMORANDUM OPINION

Mark A. Denney, Jr., Esquire, Department of Justice, 820 North French Street, 7<sup>th</sup> Floor, Wilmington, Delaware 19801. Attorney for State of Delaware.

Steven P. Wood, Esquire and Chelsea A. Botsch, Esquire, McCarter & English, LLP, Renaissance Centre, 405 North King Street, 8<sup>th</sup> Floor, Wilmington, Delaware 19801. Attorneys for Defendant.

**CARPENTER, J.**

Before the Court is Defendant Kathleen McGuiness’s (“Defendant” or “McGuiness”) Motion to Compel Discovery pursuant to Delaware Superior Court Rule of Criminal Procedure 16(d)(2) and 16(d)(3)(C).<sup>1</sup> For the reasons set forth in this Opinion, Defendant’s Motion to Compel is **GRANTED in part** and **DENIED in part**.

### **I. Factual and Procedural Background**

On October 10, 2021, the Defendant was charged by indictment in the above captioned matter with Conflict of Interest (Count One), Felony Theft (Count Two), Structuring: Non-Compliance With Procurement Law (Count Three), Official Misconduct (Count Four), and Act of Intimidation (Count Five).<sup>2</sup> Defendant was reindicted by a different Grand Jury on March 28, 2022.<sup>3</sup> The new indictment did not include any new or additional charges but extended the date range for Counts Four and Five, and included additional facts to support Count Three.<sup>4</sup>

On November 30, 2021, pursuant to Delaware Superior Court Criminal Rule 16, the Defendant made a discovery request to the State and asked for “all information and materials in the possession of the State which fall within the ambit

---

<sup>1</sup> Def.’s Mot. to Compel Discovery, D.I. 33, 2110001942 (Jan. 31, 2022)(hereinafter “Def.’s Mot. to Compel”).

<sup>2</sup> *Id.* at ¶1.

<sup>3</sup> Re-Indictment, D.I. 54, 2110001942, (Mar. 28, 2022).

<sup>4</sup> *Id.*

of *Brady v. Maryland*...and its progeny.”<sup>5</sup> Defendant also specifically demanded the production of:

- (1) any personnel policies prohibiting or limiting nepotism in State employment as maintained by the Attorney General’s office or other State agency, department, or entity,
- (2) any request to disclose individual user eResource records made to the Department of Technology and Information, by or on behalf of the Attorney General’s office or other State agency, department, or entity, between specific dates,
- (3) any contracts, and related documents, for professional services in an amount of \$50,000 or less entered into by the Attorney General’s Office or other State agency, department, or entity, between specific dates and,
- (4) the names, job description and current or most recent salaries, compensation or fees earned by any person, firm or entity employed by the Attorney General’s office or the State of Delaware who made any campaign contributions between specific dates.<sup>6</sup>

On December 17, 2021, the State replied to the discovery request and objected to Defendant’s *Brady* requests numbered 1, 3, and 4 as “outside the scope of Rule 16 or immaterial.”<sup>7</sup> Defendants filed a Motion to Compel that discovery on January 31, 2022.<sup>8</sup> On February 15, 2022, the State responded arguing the requested materials are irrelevant but provided Defendant with a copy of the Department of Justice’s Anti-Nepotism policy,<sup>9</sup> and explained that it already provided a chart from

---

<sup>5</sup> Def.’s Mot. to Compel at ¶4.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at ¶5.

<sup>8</sup> Def.’s Mot. to Compel at 12.

<sup>9</sup> State’s Resp. in Opp’n to Def.’s Mot. to Compel, D.I. 36, at ¶4 (Feb. 15, 2022)(hereinafter “State’s Resp.”), *See also* State’s Rep. Ex. B (Anti-Nepotism Policy).

the Department of Technology and Information (DTI) showing the requests made by statewide elected officials for email monitoring, during the time prescribed.<sup>10</sup>

On April 7, 2022, the Court held oral argument on Defendant's Motion to Compel, and now, issues its decision.

## **II. Standard of Review**

In evaluating a motion to compel discovery, the Court determines whether the discovery sought is reasonably calculated to lead to admissible, non-privileged evidence.<sup>11</sup> “The scope of permissible discovery is broad, therefore objections to discovery requests, in general, will not be allowed unless there have been clear abuses of the process which would result in great and needless expense and time consumption. The burden is on the objecting party to show why the requested information is improperly requested.”<sup>12</sup>

## **III. Discussion**

Defendant contends that her discovery requests are for a selective prosecution defense to one or more of the charges.<sup>13</sup> Defendant intends to show that the conduct alleged in the indictment is commonplace throughout the State government and to

---

<sup>10</sup> State's Resp. at ¶7.

<sup>11</sup> *Hunter v. Bogia*, 2015 WL 5050648, at \*2 (Del. Super. Ct. July 29, 2015).

<sup>12</sup> *Id.* (citing *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 802 (Del. Ch. 2004)).

<sup>13</sup> Def.'s Mot. to Compel at ¶4.

impeach the State's witnesses to the extent the evidence suggests an incomplete or selective investigation or bias, among other things.<sup>14</sup>

The Court finds that Defendant presents a “colorable basis” for a selective prosecution defense and will permit discovery. A “colorable basis” does not require that the Defendant make out a *prima facie* case, but the Defendant must present some evidence tending to show the existence of the essential elements of the defense to be entitled to discovery.<sup>15</sup> Defendant appears to be the first person criminally prosecuted under both 29 *Del. C.* § 5805 and 29 *Del. C.* § 6903 and asserts there are others in state government who acted similarly but were not prosecuted. These assertions lay the initial foundation for the first prong of Defendant's selective prosecution claim and take the discovery request past frivolous.

One of the elements of a selective prosecution defense requires a showing that similarly situated individuals were not prosecuted, although performed the same conduct and violated the same statutes as the defendant.<sup>16</sup> Therefore, Defendant's discovery request should be limited to information that focuses on similarly situated

---

<sup>14</sup> *Id.*

<sup>15</sup> *State v. Walton*, 2002 WL 126400, at \*3 (Del. Super. Ct. Jan. 17, 2002)(citing *Wayte v. U.S.*, 470 U.S. 598 (1985)).

<sup>16</sup> *State v. Wharton*, 1991 WL 138417, at \*8 (Del. Super. Ct. June 3, 1991).

individuals,<sup>17</sup> because information relating to others who are differently situated is irrelevant.

Accordingly, the State is required to provide to the Defense the following information:

1. The name and job description of any employee, full-time or seasonal, who is or was hired by the office of a statewide elected official and who fits within the category of a “close relative” as defined by Chapter 29 of the Delaware Code, between January 1, 2019, and the present and;

2. All professional service contracts in the amount of \$50,000 or less, between January 1, 2019, and the present that were approved by the Attorney General and/or the Governor.

Additionally, it appears to the Court that the request for eResource records has been satisfied by the State’s production of a chart provided by the Department of Technology and Information (DTI) showing the requests made by statewide elected officials for email monitoring, during the time prescribed.<sup>18</sup> Likewise, the State has also produced the Department of Justice’s Anti-Nepotism policy.<sup>19</sup> The Court finds no additional production is required in these areas.

---

<sup>17</sup> See *Wayte*, 470 U.S. at 609-10; *U.S. v. Torquato*, 602 F.2d 564, 568 (3d Cir. 1979).

<sup>18</sup> State’s Resp. at ¶7.

<sup>19</sup> *Id.* at ¶4, Ex. B (Anti-Nepotism Policy).

#### **IV. Conclusion**

For the foregoing reasons, Defendant's Motion to Compel is **GRANTED in part** and **DENIED in part**.

**IT IS SO ORDERED.**

/s/ William C. Carpenter, Jr.  
Judge William C. Carpenter, Jr.